



FEDERAL ELECTION COMMISSION
Washington, DC 20463

SENSITIVE

MEMORANDUM

TO: Commissioners
Staff Director
General Counsel

MWD

FROM: Office of the Commission Secretary

DATE: September 25, 2003

SUBJECT: Statement of Reasons for MUR 5315
By Vice Chairman Bradley A. Smith and
Commissioners Michael E. Toner and
David M. Mason

The attached document is being circulated for a 48-hour review prior to public release. Absent objection, the Office of General Counsel will include this statement in the public record file in this case.

cc: Vincent Convery

Attachment

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Wal-Mart Stores, Inc.

) **MUR 5315**

**STATEMENT OF REASONS
VICE CHAIRMAN BRADLEY A. SMITH AND
COMMISSIONERS MICHAEL E. TONER AND DAVID M. MASON***

On August 12, 2003, the Commission voted 4-2 to take no action and close the file in this matter. We joined in this vote, but write separately to articulate our support for a more straightforward approach to cases raising the press exemption contained in the Federal Election Campaign Act of 1971, as amended ("the Act"). Under the Act, our regulations, and the restraint we must exercise congruent with the Constitution's First Amendment, we should dismiss cases that present us with nothing more than a feature in a periodical about a candidate, unless the evidence shows that the periodical is owned or controlled by a candidate, political committee or political party.

This matter was dismissed pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985) on August 12, due to its low score in the Commission's Enforcement Priority System ("EPS"). One reason for that low score is that the EPS discounts matters that appear to qualify for the "press exemption" of 2 U.S.C. 431(9)(B)(i). Two Commissioners initially objected on the grounds that this case was improperly rated because *Source* Magazine might not qualify for the press exemption. Other Commissioners believe that cases that qualify for the press exemption should be dismissed outright rather than closed pursuant to *Heckler*. (see, e.g. Commissioner David Mason Additional Statement of Reasons MUR 4689 (Dorman)). Thus, though partially obscured by the *Heckler*-based dismissal, this case raises the simple yet recurring question of whether a magazine story falls within the press exemption.

In this matter, Wal-Mart and Sam's Club were accused of making an illegal corporate expenditure in a federal campaign. The basis for the complaint was Senate-candidate Elizabeth Dole's cover photograph and the accompanying article in Volume 5 Number 5 (September 2002) of Sam's Club's *Source* magazine. The article described Ms. Dole's interest in promoting literacy. The article appeared among others describing how to entertain large groups, the differences among various cuts of meat, and reflections on September 11, 2001.

* This Statement of Reasons replaces the original dated August 25, 2003, and contains a technical correction to accurately report the Commission vote in this matter..

Source was mailed nationally to Sam's Club members, including about 191,000 in North Carolina. The magazine was also distributed to Sam's Club stores, including Sam's Club's 16 North Carolina locations, which received 100 copies each.¹ The complainants contend that this magazine was a prohibited corporate contribution by Wal-Mart and Sam's Club. They asserted: "The timing – less than two weeks before the Primary Election – was clearly a blatant attempt by the nation's largest corporation to influence North Carolina's election."² They alleged that the use of a Dole "campaign portrait" reflects that the article was designed to "boost her candidacy."

Wal-Mart Stores, Inc. responded that the decision to write about and to place Ms. Dole on the September 2002 cover of *Source* was made in October 2001 "without any consideration of her candidacy for the U.S. Senate whatsoever and with absolutely no intention to aid her campaign." Previous issues of *Source* had pictures and interviews with "celebrities" and the September 1999 issue featured George H.W. Bush and Barbara Bush; September 2000 had a "lead article" on literacy. There was no issue for September 2001. The Wal-Mart response noted that a photograph with a child wearing a Dole sticker was used because it fit with a quotation from Ms. Dole about children. Finally, the Wal-Mart response concluded that *Source* is within the scope of the press exception, had been published since October 1998, and the publication was "every bit as much a publication as *Newsweek*, the *National Geographic*, or *Smithsonian*."³

Under the Federal Election Campaign Act, corporations are prohibited from making "expenditures." 2 U.S.C. 441b. The term "expenditure" is defined broadly as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office . . ." 431(9)(A)(i). But the law contains a number of exceptions to this sweeping definition, the first being for "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate [.]" 431(9)(B)(i). Our regulations similarly provide that "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station . . . newspaper, magazine, or other periodical publication is not an expenditure unless the facility is owned or controlled by any political party, political committee, or candidate . . ." 11 C.F.R. 100.132.

We believe this case should be readily dismissed under the press exemption, because *Source* was a periodical and was not owned or controlled by a political party, political committee

¹ This distribution information is from a letter from Thomas J. Cooper, Sam's Club counsel, dated Sept. 5, 2002, received before the complaint was filed.

² The North Carolina primary, originally scheduled for May 7, 2002, was rescheduled as a result of court challenges to legislative redistricting. On July 17, 2002, the North Carolina State Board of Elections adopted a schedule with the new primary date, September 10, 2002. NC State Board of Elections Memorandum 2002-14.

³ Dole 2002 also filed a response in which they contended that the Commission should find no reason to believe that a violation had occurred because (1) the article lacked express advocacy, did not reference Ms. Dole's candidacy, and was therefore not a corporate expenditure in connection with an election to political office; 2 U.S.C. § 441b(a); and (2) Sam's Club, as a membership organization, has free reign to communicate to its members under 2 U.S.C. § 431(9)(B)(iii) and 11 C.F.R. § 114.3(a). Both these arguments may also have merit, but we focus here on the press exemption element of this case in an effort to provide needed clarity in an important area of the law.

or candidate. Yet to some of our colleagues it seems the inquiry is not so straightforward. But we believe any other analysis that scrutinizes attributes or motives of publications in a necessarily *ad hoc* fashion adds complexity, and with that, uncertainty to the law.

Our approach in the past has been unnecessarily complicated. For example, the analysis in MUR 3607 (Northwest Airlines, Inc.) provides an illustration.⁴ There, the Commission voted to find no reason to believe that Northwest Airlines, Inc. violated the Act's ban on corporate contributions by printing and distributing its in-flight magazine *WorldTraveler*, which contained a flattering profile of then Senator Robert Kasten. The General Counsel's Report concluded that several factors justified its recommendation that the Commission find that the articles were covered by the media exemption: the magazine was in bound pamphlet form, was published monthly, generated advertising revenue, contained articles of news and entertainment on a variety of topics, and its publisher was neither a political party, committee, or candidate, nor under their control.

We do not see where the Act instructs us to determine, as in MUR 3607, whether a publication is entitled to protection under the press exemption by considering binding, frequency of publication, revenue, or content. Respondents like Sam's Club and Wal-Mart should not feel compelled to defend against complaints by divulging irrelevant decision-making or other private business information related to their magazine. The better view is that the press exemption applies broadly to periodical publications unless they are owned or controlled by a political party, political committee, or candidate as defined in FECA.⁵

We see no justification for a narrower application of the exemption grounded in a notion that some publishers are bona fide while others are not. Moreover, extending our scrutiny in that manner creates its own set of problems. We do not think the Commission should consider whether a publisher makes a profit from its publications. If that were the standard, then many prominent "think magazines" that are significant in the Washington debate would not qualify for the press exemption.⁶ We cannot see much sense in an exemption that would protect *People* but not *The New Republic*, *The Weekly Standard*, *Harper's* or *The American Prospect*. Nor should the Commission examine whether the publication has paid subscribers. If we did, then the free weekly newspapers commonly found in most urban areas and college towns would be rejected. Nor should we require that the parent corporation be a media company, for we doubt General Electric fits that requirement, despite its ownership of NBC, yet its stations, cable channels and network should be entitled to the protection of the exemption. If we used commercial advertising as the criteria, then *Consumer's Reports* and some professional journals fall outside the exemption. If we exclude from the press exemption magazines sent only to "members" then *National Geographic* and *Smithsonian* would be unprotected. We are convinced that the Commission's standard should be simple, objective, and grounded in the statute. That is, when

⁴ Commission Certification in MUR 3607 dated Nov. 12, 1993; Commissioners Aikens, Elliott, McDonald, Potter, and Thomas voted affirmatively; Commissioner McGarry did not cast a vote.

⁵ We also believe the additional factors considered in previous Advisory Opinions unnecessarily complicate our press exemption analysis. See 1996-41, 1996-48, 1996-16.

⁶ See, e.g., David Carr, A Magazine's Radical Plan: Making a Profit, *New York Times* (Aug. 4, 2003).

considering a periodical, unless we find ownership or control by a political party, committee, or candidate, the press exemption applies.

To the extent we have guidance from the courts on how to proceed, we read the cases as congruent with our analysis. The one FECA-based Supreme Court decision considering a publisher that was not a conventional press entity is *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).⁷ There, the Supreme Court determined that a special edition of the group's newsletter that did not conform to past issues did not fall within the exemption. Although the group published a newsletter irregularly for six previous years, the "special edition" at issue in the case was not written by regular staff, did not use the newsletter masthead, was not distributed through the regular channels, and did not feature a volume number or issue number that would show it to be an issue of the group's periodical. 479 U.S. at 242-43.⁸ The Court did not reach the issue of whether the newsletter in its ordinary periodical form would be exempted.

The instruction we draw from *MCFL* is that the special production of the newsletter in that case caused the issue to fall outside the protection of the press exemption. As we read this case, these factors are properly evaluated to determine whether a document is, in fact, a "periodical." None of these kinds of questions was raised against the Sam's Club *Source* magazine.⁹

The Supreme Court has ruled in other cases that the First Amendment requires an unfettered press. In *Miami Herald Pub. Co. v. Tornillo*, Justice Burger, writing for the Court, observed that "[i]t has yet to be demonstrated how governmental regulation . . . can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." 418 U.S. 241, 258 (1974). Properly understood, the Constitution's protection applies not just to conventional press entities, but publishers generally. "The press does not have a monopoly on either the First Amendment or the ability to enlighten." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782; *see also* 435 U.S. at 798-800 (1978) (Burger, J. concurring with historical analysis).

Particularly distasteful from a First Amendment perspective is what Justice Burger identified in his *Bellotti* concurrence as the problem of "definition."

The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England – a system the First Amendment was intended to ban from this country.

⁷ Courts have considered the application of the press exemption to conventional press entities in *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981) and *FEC v. Phillips Publ'g, Inc.*, 517 F. Supp. 1308, 1312 (D.D.C. 1981).

⁸ *See also United States v. CIO*, 335 U.S. 106 (1948) (interpreting Corrupt Practices Act).

⁹ Before *MCFL*, The Commission also considered the scope of "periodical" in its *Funding and Sponsorship of Federal Candidate Debates* rulemaking, *see* 44 Fed. Reg. 76,734, 76,735 (Dec. 27, 1979) (*Explanation and Justification*).

435 U.S. at 801. Justice Kennedy, in his dissent in *Austin v. Michigan Chamber of Commerce* (joined by Justices O'Connor and Scalia), made a similar observation regarding a government agency's capacity to choose among speakers:

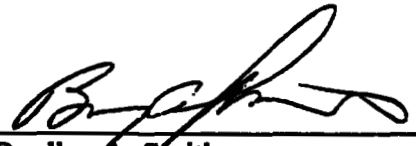
There can be no doubt that if a State were to enact a statute empowering an administrative board to determine which corporations could place advertisements in newspapers and which could not . . . the statute would be held unconstitutional.

494 U.S. 652, 700-01 (1990).

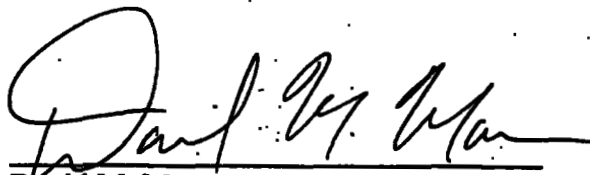
Our interpretation of the press exemption flows from the restraint the Court tells us the Commission should exercise in this area of critical First Amendment concern. While *MCFL* shows that assessing the legitimacy of a document as a "periodical" may be necessary, in general the press exemption should be broadly construed to insulate the content of publications (and editorial judgment of publishers) from regulation.

In our view, dismissal in MUR 5315 is dictated by the statute and the constraints we face under the Constitution. The Commission should declare that a story – no matter how complimentary, critical, or "political" and without reference to motive, intent, or publisher's viability – published in a periodical, is protected by the press exemption and therefore is not an expenditure under the Act. It only could become an expenditure if the periodical is owned or controlled by a political party, political committee, or candidate.

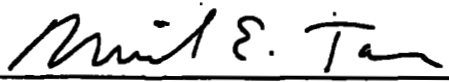
September 25, 2003



Bradley A. Smith
Vice Chairman



David M. Mason
Commissioner



Michael E. Toner
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